

02900

Spangenberg
PC-59

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

B-218198.6; B-218198.7;
B-218198.8; B-218198.9;
B-218637.2; B-219007.2;

FILE: B-219028.2

DATE: December 10, 1985

MATTER OF: T.V. Travel, Inc.; World Travel Advisors,
Inc.; General Services Administration--
Request for Reconsideration

DIGEST:

1. GAO will consider protests of competitive selections of no cost, no fee travel management services contractors under GAO's bid protest authority under the Competition in Contracting Act since the selections are procurements of contracts for services.
2. Competitive selections of no cost, no fee travel management contractors by the General Services Administration are subject to the procurement provisions of the Federal Property and Administrative Services Act, as amended by the Competition in Contracting Act. These selections are not distinguishable from those noncompetitive business arrangements for substantially similar services that some agencies have with Scheduled Airline Ticket Offices (SATO's). Therefore, these SATO business arrangements are subject to applicable procurement laws. Omega World Travel, Inc.; Society of Travel Agents in Government, Inc., B-218025, B-218025.2, May 23, 1985, 64 Comp. Gen. ___, 85-1 C.P.D. ¶ 590 is overruled.
3. Scheduled Airline Ticket Office proposed by Air Transport Association is a joint venture with capacity to contract with government.

033968/125589

4. Proof of authority of person who executed proposal to bind the joint venture on a negotiated procurement may be furnished after receipt of proposals or best and final offers.
5. Protest that awardee will not meet contract requirements concerns affirmative determination of responsibility, which will not be considered except in limited circumstances not present here, or is a matter of contract administration not for consideration under GAO's Bid Protest Regulations.
6. Letter received from awardee after award concerns contract administration and does not constitute improper discussions.
7. Evaluation of 37 proposals by a 26-person technical panel where only four of the evaluators read and rated each proposal is not an abuse of agency discretion.
8. Evaluation of awardee's proposal under rating plan used to evaluate proposals in three areas, where it was apparently not downgraded, appears to be improper, when the proposal fails to address two areas and in the third area proposes less than the optimum staffing preference indicated in rating plan and solicitation evaluation criteria. Protest is sustained and it is recommended that proposals in the competitive range be rescored and award made to highest rated offeror.
9. Protest filed more than 10 working days after the protester was apprised that award was made to another bidder is untimely under GAO's Bid Protest Regulations.
10. Award to large business under small business set-aside is proper where contracting officer was unaware of SBA

determination when he made the award, had waited more than 10 business days from when SBA received the size protest and where there has been no showing that the awardee's small business self certification is in bad faith or that contracting officer knew it was not a small business. However, GAO recommends that options not be exercised on large business awardee's contract.

T.V. Travel, Inc. (T.V. Travel) and World Travel Advisors, Inc. (World Travel), request reconsideration of our decision in T.V. Travel, Inc.; World Travel Advisors, Inc.; Discovery Tour Wholesalers, Inc., B-218198, et al., June 25, 1985, 85-1 C.P.D. ¶ 720. Additionally, the General Services Administration (GSA) requests reconsideration of this decision and our decisions in W.B. Jolley, B-219028, June 27, 1985, 85-1 C.P.D. ¶ 737; Vida Fox Clawson Travel Services, Inc., B-218637, July 2, 1985, 85-2 C.P.D. ¶ 16; and Get-A-Way Travel, Inc., B-219007, July 2, 1985, 85-2 C.P.D. ¶ 18.

These decisions dismissed various protests of GSA awards for the arrangement of travel services for official government travel for various geographical areas because we found that the award selections are exempt from the procurement statutes. The awards were based upon competitive solicitations which led to no cost, no fee contracts for travel management centers. The travel agents or Scheduled Airline Ticket Offices (SATO) which become travel management centers obtain their compensation from the air carriers and the other firms which supply travel to the government or government employees. We concluded that these contracts are no more than a management vehicle to obtain travel services which themselves are exempt from the procurement procedures. These decisions followed our decision in Omega World Travel Inc.; Society of Travel Agents in Government Inc., B-218025, B-218025.2, May 23, 1985, 64 Comp. Gen. ___, 85-1 C.P.D. ¶ 590, which denied a protest of the noncompetitive selection by the Navy of a SATO to provide basically the same travel management services.

GSA's request for reconsideration is untimely on the T.V. Travel and W.B. Jolley decisions, since GSA did not request reconsideration until more than 10 days after its

receipt of these decisions. 4 C.F.R. § 21.12 (1985). Consequently, GSA's request for reconsideration of W.B. Jolley (B-219028) is dismissed. However, since T.V. Travel and World Travel timely filed their reconsideration requests, GSA's views as an interested party in that case will be considered.

T.V. Travel, World Travel and GSA contend that our decisions on the GSA travel management center selections are erroneous as a matter of law because the selections are subject to the procurement statutes and regulations, and are subject to our bid protest jurisdiction. In this regard, GSA asks us to reconsider the rationale of our decision in Omega World Travel, where we held that obtaining such services was not a procurement subject to the procurement laws. We have solicited and considered the views of the Navy in response to GSA's reconsideration request.

For the reasons stated below, we reverse our dismissal of those protests of GSA travel management center selections on which we received timely requests for reconsideration, and will consider the merits of those protests under our Bid Protest Regulations, 4 C.F.R. Part 21 (1985). We also overrule our decision in Omega World Travel, 64 Comp. Gen. supra. T.V. Travel and World Travel's protests (B-218198) are sustained; Vida Fox Clawson Travel's (Clawson Travel) protest (B-218637) is denied; and Get-A-Way Travel's protest (B-219007) is dismissed as untimely.

GAO JURISDICTION OVER PROTESTS

We now decide that consideration of the merits of the protests of GSA's travel management center selections would be appropriate under our Office's newly defined bid protest authority under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C.A. §§ 3551-3566, West Supp. 1985, as added by § 2741(a) of Pub. L. 98-369, and that the GSA selections are subject to the Federal Property and Administrative Services Act (FPASA). Furthermore, we conclude that the noncompetitive contracts or other business arrangements, which various federal agencies have with SATO's or travel agents to perform travel management services, are procurements subject to the applicable procurement laws.

Prior to the implementation of the procurement protest system authorized by CICA, we decided bid protests based on

our authority to adjust and settle government accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. § 3526 (1982). See Monarch Water Systems, Inc., B-218441, Aug. 8, 1985, 64 Comp. Gen. ___, 85-2 C.P.D. ¶ 146. CICA redefined a protest cognizable by our Office as a:

"Written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services, or a written objection by an interested party to a proposed award or the award of such a contract." 31 U.S.C.A. § 3551(1) (West Supp. 1985).

That is, our authority is no longer based upon our "accounts settlement" authority, but rather is based on whether the complaint concerns a procurement contract for property or services. GSA is obtaining services under contract from the selected travel management center contractor, even though it is not paying the contractor for these services. The contract awarded contains most of the ordinary clauses contained in procurement contracts. Also, GSA utilizes the procurement system to select the travel management contractors.

Furthermore, GSA has stated that its selections of travel management center contractors are procured pursuant to the Federal Acquisition Regulations (FAR) and the FPASA. GSA is the cognizant agency responsible for prescribing policies and methods of procurement and supply of transportation services for the federal government. 40 U.S.C. § 481 (1982). See also, Federal Property Management Regulation, Temporary Regulation A-24, 50 Fed. Reg. 27951 (1985) which governs the use of travel management centers for federal civilian agencies.

We now agree with GSA. As indicated in the Omega World Travel decision, transportation obtained through Government Bills of Lading (GBL) or Government Travel Requests (GTR) is

not subject to the procurement laws. See FAR, 48 C.F.R. §§ 47.000(a)(2), 47.200(b)(2) (1984). However, the travel management services in question here are obtained by procurement solicitations which are contractual vehicles considerably different from GBL's or GTR's. GSA states that it consistently adheres to the FPASA and the FAR when it obtains transportation services through procurement solicitations and contracts.

Moreover, it is clear that the government is receiving a number of valuable services, other than the airline tickets, from the travel management centers, such as ticket delivery, making of reservations, management reports, etc., and that the travel management contractor is obtaining considerable benefits with his concomitant exclusive access to the government business and entitlement to commissions.

Furthermore, 40 U.S.C. § 481(a)(1) empowers GSA to prescribe policies for the "procurement and supply of . . . nonpersonal services, including related functions such as . . . transportation". Further, 40 U.S.C. § 481(a)(3) empowers GSA to "procure and supply . . . nonpersonal services for the use of executive agencies". By definition nonpersonal services includes transportation. There is nothing in the FPASA or any other statute that specifically exempts the procurement of transportation services from the FPASA.

Moreover, we have held that the FPASA is applicable where services or supplies are obtained by a civilian agency through contract, even where no cost or fee is paid to the contractor. Use of Government Property by Private Firm for Commercial Purpose, B-191943, Oct. 16, 1978 at pgs. 5-6 (the selection of a firm to be given an exclusive license to operate on government property where the firm will provide for a fee, certain documents to the public on behalf of a federal agency, is subject to the Federal Procurement Regulations (FPR) (FAR's civilian agency predecessor regulation); B-217448, Mar. 31, 1985 (letter and memorandum to the Chairman, House Committee on Government Operations holding that a no cost no fee exchange agreement between the Patent and Trademark Office (PTO) and a firm to exchange the firm's automatic data processing nonpersonal services for special access to PTO information on trademarks and patents was subject to the Brooks Act, 40 U.S.C. § 759 (1982), the FPR, and the FPASA).

In view of the foregoing, we find the services obtained through the GSA travel management centers are subject to our bid protest jurisdiction and are covered by the procurement laws contained in the FPASA, as amended by CICA. Our previous decisions on these selections are modified accordingly and we reinstate those protests on which we received timely protests.

As was noted in our previous decisions dismissing the protests of the GSA selections, the GSA's business arrangements for travel management centers are not distinguishable from those noncompetitive SATO arrangements, such as the Navy's in Omega World Travel, where the SATO's perform services substantially similar to those performed by the GSA travel management center contractors. Consequently, such business arrangements with SATO's or travel agencies are subject to applicable procurement laws. ^{1/}Consequently, we overrule our decision in Omega World Travel.

T.V. TRAVEL AND WORLD TRAVEL PROTESTS

1. Background

T.V. Travel and World Travel protested the award by GSA under solicitation No. AT/TC 19791 of a contract to a SATO to be the federal civilian travel management center for the Atlanta, Georgia, metropolitan area. The SATO proposal was submitted by the Air Transportation Association of America (ATA).

Fifteen proposals were received for the Atlanta travel management center and the initial technical scores (out of a total possible 900 points) awarded the five proposals found by GSA to be within the competitive range were:

^{1/} Also section 1464 of the Department of Defense Authorization Act of 1986, Pub. Law 99-145, November 7, 1985, states:

"It is the sense of the Congress that the Secretary of each military department should provide, in the establishment of travel offices or the acquisition of travel services for official travel, for free and open competition among commercial travel agencies, scheduled airline traffic offices (SATO's), and other entities which provide such services."

T.V. Travel	882 points
SATO	872 points
Corporate Travel International	843 points
World Travel	820 points
Universal Travel	813 points

After site visits, discussions and best and final offers, the SATO was selected for award. GSA's selection statement reads, in pertinent, part as follows:

"During 'best and final' negotiations SATO agreed to include Corporate Services International as part of their services, to include the Corporate rate hotel program. Thus bringing their proposal above 882 points. Added advantages are: Billing and delivery of ticket procedures are already presently established and no change in operation would be necessary. Administrative burden of setting up these procedures would be burdensome and time consuming because of lack of resources for 60 federal agencies and GSA thus saving administrative costs.

"Award to SATO is therefore considered to be in the Government's best interest as they have the best qualified offer."

There is no indication or documentation in the record of SATO's final score, except that it is said to be more than 882 points. T.V. Travel's initial high technical score of 882 points apparently was not raised or lowered after best and final offers.

On February 15, 1985, as timely supplemented on April 8, 1985, T.V. Travel and World Travel protested the award because (1) the SATO lacks contractual capacity; (2) the SATO is not a responsible contractor because it cannot issue boarding passes by April 1, 1985, as promised in its proposal; (3) GSA improperly considered a letter submitted by SATO concerning its boarding pass capability a month after best and final offers; (4) not all members of the GSA

technical evaluation panel reviewed the awardee's proposal; (5) SATO's proposal received too many points and should have been downgraded in a number of technical areas; (6) the SATO did not comply with the RFP requirement that it have a "system with a direct interface between the reservation, ticketing and accounting elements"; and (7) SATO was improperly credited with its incumbency in making the award selection.

In its May 8, 1985, response to a supplementary agency report, the protesters list a number of additional areas where the SATO proposal should have been downgraded. However, these additional contentions, raised piecemeal, are untimely and will not be considered under our Bid Protest Regulations since they were not protested within 10 working days of when the protesters were made aware of the scoring of the SATO's proposal. 4 C.F.R. § 21.2(a) (1985); Professional Review of Florida Inc.; Florida Peer Review Organization, Inc., B-215303.3; B-215303.4, Apr. 5, 1985, 85-1 C.P.D. ¶ 394.

2. SATO's Alleged Lack of Contractual Capacity

T.V. Travel and World Travel protest that the SATO lacks contractual capacity because it is not a legal entity. The protesters contend that the SATO arrangement is merely an agreement among scheduled airlines to cooperate on ticketing.

SATO's are operating under the auspices of the ATA through its marketing and service division, the Air Traffic Conference of America (ATC). The ATA is a national trade and service organization whose membership consists of various scheduled air carriers. The ATA submitted the SATO proposal and identified itself as a joint venture. See also Omega World Travel Inc., et al., 64 Comp. Gen. supra.

Joint ventures are recognized legal entities for contracting with the government. See FAR, 48 C.F.R. subpart 9.6 (1984). A joint venture is an association of persons or firms with an intent, by way of contract, to engage in and carry out a single business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge. 46 Am. Jur. 2d Joint Ventures § 10 (1969); 48A C.J.S. 2d Joint Ventures § 1 (1981). In this case, a number of scheduled air carriers entered into a

written agreement to propose SATO's on GSA's travel management center contracts. This agreement provides for the responsibilities, profits, liabilities and resources provided by the participating airlines. Consequently, we believe that the proposing entity, ATA, is a joint venture for the purpose of proposing on this solicitation and that the ATA participating members are the joint venture partners with all the liabilities that that status entails.

The protesters also argue that the SATO lacks contractual capacity because the proposal, which was signed by ATA's Director of the Military and Government Transportation Services Bureau, did not contain powers-of-attorney signed by officials of each of the joint venturers nominating this person as attorney-in-fact for the joint venture for purposes of executing the proposal and resultant contract.

This protest basis also has no merit. It is clear that under formally advertised procurements a bidder may furnish evidence of the authority of the person which executed its bid to bind the bidder after bid opening. Marine Power and Equipment Company, 62 Comp. Gen. 75 (1982), 82-2 C.P.D. ¶ 514; Sevcik-Thomas Builders and Engineers Corporation, B-215678, July 30, 1984, 84-2 C.P.D. ¶ 128. The rule should be no more strict in negotiated procurements and evidence of authority to bind an offeror may be submitted after the closing date for receipt of proposals or best and final offers, if there is any question of the authority of the person who executed the proposal. Cambridge Marine Industries, Inc., 61 Comp. Gen. 187, 189 (1981), 81-2 C.P.D. ¶ 517.

From our review, the ATA and ATC, of which the participating airlines are members, granted the ATA representative who executed the proposal the requisite authority to bind the SATO joint venture. This protest basis is therefore denied.

3. Boarding Pass Capability

The protesters contend that the SATO was not able to issue boarding passes by April 1, 1985, as required by the solicitation. This criteria admittedly concerns SATO's responsibility. This Office will not review an affirmative determination of responsibility, where, as here, possible

fraud or bad faith by the contracting officer has not been shown and no allegation had been made that definitive responsibility criteria have not been applied. AT&T Information Systems, Inc., B-216386, Mar. 20, 1985, 85-1 C.P.D. ¶ 326. Additionally, whether the SATO will perform the contract in accord with the requirements is a matter of contract administration, and as such, it is the contracting agency's responsibility not encompassed by our bid protest functions. Advanced Structures Corporation, B-216102.2, B-216102.3, Mar. 28, 1985, 85-1 C.P.D. § 370. Consequently, this protest basis is dismissed.

The protesters also object to GSA's reference to a letter dated February 25, 1985, from Delta Airlines, Inc., one of the joint venturers, promising timely installation of the equipment necessary to assure the boarding passes by April 1, 1985. The protester contends that this constitutes improper discussions, under the FAR, with one offeror in the competitive range to make its proposal acceptable without opening up discussions with all firms in the competitive range. This contention has no merit. The referenced letter was submitted 3 weeks after award and obviously concerned the administration of the contract and not award selection. Consequently, no discussions were required with the other offerors who had been in competitive range. This protest basis is therefore denied.

4. Scoring by all Technical Evaluators

The protesters allege that GSA committed a procedural error in that one or more members of the technical review panel did not review SATO's proposal. GSA reports that the technical review panel was made up of 26 persons from the user agencies of which four persons were to evaluate each initial proposal. If a proposal contained a recommendation by a user agency for a particular offeror, that user agency's representatives were excluded from evaluating that particular proposal. The initial technical score of each offeror is the sum of the scores of the four evaluators who read and rated the proposal.

It is within the contracting agency's discretion as to how many and which members of a technical evaluation panel will review each proposal. Data Resources, Inc., B-203166, Aug. 5, 1981, 81-2 C.P.D. ¶ 98. Consequently, we have recognized that a procuring agency may properly evaluate

individual proposals with less than the entire evaluation panel and not all members of the panel need review each proposal. Data Resources, Inc., B-203166, supra; Design Concepts, Inc., B-186125, Oct. 27, 1976, 76-2 C.P.D. ¶ 365. In this procurement, where 37 total proposals for six city areas were received, GSA did not abuse its discretion in this evaluation method.

5. Rating of SATO's Proposal

T.V. Travel and World Travel protest the evaluation of SATO's proposal. The protesters allege that SATO's proposal was "nonresponsive" because it did not propose a system with "direct interface" between the reservation, ticketing and accounting elements. The protesters also allege that SATO could not have earned the 872 out of 900 possible points that it was awarded on the initial evaluation. In this regard, the protesters allege a number of SATO proposal deficiencies including (A) SATO's alleged failure to have its headquarters in the Atlanta area; (B) its failure to propose one travel counselor for each \$500,000 in anticipated travel volume; (C) its inability to reconcile automatically Diners Club credit card billings with management reports; and, (D) its inability to transmit management reports electronically.

The initial proposals of the offeror were scored in accordance with a rating plan with a total possible 225 points (900 possible points with four evaluators). This rating plan was not disclosed to any offeror until after award. These protest contentions are based upon GSA's scoring of SATO's proposal under the rating plan.

A. Atlanta Headquarters

Under the rating plan, seven points (28 points for four evaluators) were to be awarded if the firm's headquarters is located in the city to be served. In the initial report, GSA states that SATO identified its headquarters as Washington, D.C.--the ATA headquarters. However, in the report on the supplemental protest, GSA indicates that SATO's proposal was evaluated under the rating plan with Atlanta as the headquarters.

In response to our query, GSA indicated that it no longer has in its files any of the evaluators' individual scoring sheets under the rating plan for either initial or

best and final offers. Consequently, we are unable to verify precisely how this matter was evaluated. GSA did provide summary scores for the five general areas evaluated. These indicate that SATO was downgraded only four points out of 280 possible points (four evaluators) for the general area of project management, whereunder this aspect of the rating plan was evaluated. It follows that SATO was not downgraded for its headquarters location.

Our review of SATO's proposal indicates that the Atlanta SATO office has the authority to implement, coordinate and supervise the services provided. The proposal also indicates that an ATA employee located in Washington, D.C., has the ultimate total responsibility for oversight, management and operations. It appears that the Atlanta SATO operates as an individual entity with the ATA providing only policy guidance. Further, the only evaluation criteria stated in the solicitation, to which this aspect of the rating plan relates, is that "the offeror facilities will be evaluated on the basis of how the location . . . relate[s] to the level of services provided the government." Under the circumstances, we find that GSA acted reasonably in not downgrading SATO's proposal.

B. Direct Interface of System Elements

T.V. Travel and World Travel also contend that SATO's proposal should have been rejected as "nonresponsive," or at least downgraded, because of its failure to have a system with "direct interface" between certain system elements. In this regard, paragraph "M(1)" of the solicitation states in pertinent part:

". . . The Contractor must provide automated reservation equipment capable of displaying all available fares. In addition, the Contractor must have a system with direct interface between the reservation, ticketing and accounting elements so that all passenger reports and summary data may be automatically generated from point-of-sale information."

Under the rating plan, three points (12 points for four evaluators) were allocated to a rating plan criteria which stated in pertinent part:

"The Offeror has already computer support for accounting, including software which interfaces with the reservation and ticketing functions. . . . If the offeror has developed his/her own program, the proposal should clearly indicate that it interfaces with the res/ticketing system."

SATO's offer proposed the TYNMET MARSPLUS (Multi-Access Reservation System) automated reservations and ticketing system. SATO also enhanced its system with a Tandy 1000 personal computer to prepare the required management information reports and to perform accounting and billing. GSA states that it has no reason to question SATO's capability to meet its requirements.

The SATO proposal does not state that the accounting, reservation and ticketing functions will directly interface. Also, there is no explanation of how reports will be automatically generated from point-of-sale information. Further, there is no statement of any specific hardware or software interface between the MARSPLUS system and the Tandy 1000 computer. On the other hand, the solicitation does not define what is meant by "direct interface," and thus what GSA actually intended by this paragraph is not entirely clear. In this case, it appears that a data base for ticketing and reservations is obtained from the MARSPLUS system which is somehow put into the Tandy computer to prepare the required management reports and to perform accounting and billing. Therefore, despite the less than clear explanation in SATO's proposal, we are unable to conclude that SATO's proposal is not in compliance with paragraph "M(1)" or that the proposal should have been downgraded in this area.

C. Number of Travel Agents

The protesters also contend that SATO should have been downgraded for not proposing one travel counselor for each \$500,000 of anticipated travel. This criteria is worth three points (12 points for four evaluators) in the rating plan utilized. GSA states that SATO proposed 15 travel counselors and that only one travel counselor per \$700,000 in anticipated travel was required by the solicitation.

However, our review of SATO's proposal only indicates that 14 travel counselors were proposed. The government's estimated travel under this contract is reported to be approximately \$10 million. Therefore, it appears that SATO proposed only one travel counselor for approximately \$715,000 in anticipated travel. Although this ratio does not violate solicitation requirements, both the evaluation criteria set forth in the solicitation and the rating plan indicate that offerors which proposed one travel counselor per \$500,000 in anticipated travel will be rated higher than those who proposed fewer counselors. Consequently, the SATO apparently should have been downgraded for not proposing one counselor per \$500,000.

This aspect of the rating plan is also under the project management category, where SATO was downgraded only 4 points out of a total possible 280 points (four evaluators). Consequently, it seems likely that the SATO was not downgraded in this area either. Therefore, it appears this aspect of the evaluation was improper.

D. Diners Club Account Reconciliation

The protesters also contend that the SATO should have been downgraded for failing to "demonstrate willingness and capability to perform automated reconciliation of accounts for agencies participating in GSA's Diners Club contract." Five points (20 points for four evaluators) are allocated to this evaluation criteria in the rating plan. The evaluation criteria set forth in the solicitation states that this is an enhancement which will be awarded additional points in the evaluation.

GSA has not responded to this protest contention. SATO received a perfect score in the initial evaluation for the general category of equipment capability, of which this aspect of the rating plan is a part. Therefore, it is apparent that GSA did not rate this as a deficiency. From our review of SATO's proposal, there is no indication that SATO has this capability. Therefore, it appears that GSA did not properly evaluate this matter.

E. Electronic Transmission of Summary Reports

GSA again did not respond to the protest allegation that SATO should have been downgraded because it cannot "transmit summary reports electronically." Under the rating

plan, two points (eight points for four evaluators) were allocated to this item. As noted above, SATO was not downgraded for any aspect of equipment capability of which this aspect of the rating plan is a part. Our review of SATO's proposal reveals that there is no indication that SATO has this capability. Therefore, it appears that GSA did not properly evaluate this matter.

6. Recommendation

SATO's proposal was apparently not properly rated in a number of evaluation areas. There is no indication that these matters were discussed with SATO or corrected in its best and final offer. Indeed, the record does not reveal SATO's final point score. In view of the relatively close point scores, GSA's award selection conclusion that SATO's proposal received the highest point score may well be incorrect.

T.V. Travel's and World Travel's protests are therefore sustained. It is recommended that GSA reevaluate those proposals in the competitive range in the aforementioned areas and determine which offeror is the highest ranked. If SATO is not the highest ranked, then we recommend that its contract be terminated for the convenience of the government and award made to the highest rated offeror.

T.V. Travel and World Travel protest that the award was improperly based upon SATO's incumbent status--an evaluation criteria not set forth in the solicitation. In its report, GSA states that this was not a factor in the award selection. GSA explains that the statements in the selection statement regarding the advantage of selecting the incumbent are only "added advantages," not controlling the award selection, and SATO received the award because it received the highest score. In view of GSA's position, we need not consider this protest basis further and it is denied.

GET-A-WAY TRAVEL'S PROTEST

Get-A-Way Travel protested the award by GSA under solicitation No. GSA-3FC-85-N-001 of a contract to Cherry Hill Travel, Inc., to be the travel management center for the Philadelphia, Pennsylvania, metropolitan area. Get-A-way Travel contends that GSA was biased against it in evaluating its proposal.

GSA contends that Get-A-Way's Travel's protest is untimely under our Bid Protest Regulations. We agree.

Get-A-Way Travel protested this same matter to the contracting officer by letter dated April 2, 1985. GSA denied this protest by letter dated May 9, 1985. The protester was orally apprised on May 10, 1985, that award had been made to Cherry Hill Travel. Get-A-Way Travel's protest was filed in our Office on May 30, 1985.

Section 21.2(a)(3) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1985) requires that when a protest has been initially filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of when the protester becomes actually aware of the adverse agency action on the protest. Get-A-Way Travel's protest to our Office was filed more than 10 working days after it was apprised of the award to Cherry Hill Travel. Therefore, the protest is untimely and is dismissed.

CLAWSON TRAVEL PROTEST

Clawson Travel protests the GSA award of a contract under solicitation No. 8FCG-E6-DU008 to Morris Travel Corporation (Morris) to be the travel management center for the Salt Lake City, Utah, metropolitan area. The protester alleges that the Small Business Administration (SBA) found that Morris is not a small business and that GSA should not have made award to Morris until it received the SBA's ruling on a size protest of Morris' status. We deny the protest.

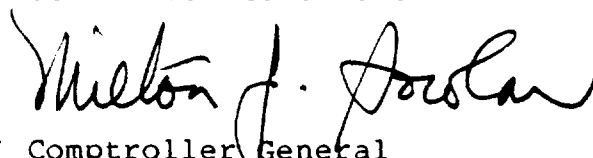
A size protest had been filed on March 26, 1985, with GSA alleging that Morris was not a small business. GSA forwarded the matter to the SBA on March 28, 1985, and made several telephone calls (April 18 and May 2) to ascertain the status of the SBA size determination. GSA reports that no indication was given by SBA that a decision on the protest was imminent. On May 6, 1985, the SBA found that Morris was not a small business concern. On May 7, 1985, GSA made award to Morris. GSA reports that it was unaware of SBA's size determination at that time.

FAR, 48 C.F.R. § 19.302(h)(1) (1984) provides that a contracting officer shall not award a contract after receiving a timely size protest until the SBA has made a

size determination or until 10 business days have expired since the SBA's receipt of the protest, whichever occurs first. Since the contracting officer waited more than 10 business days and did not receive notice of the size determination prior to award, he was justified in proceeding to award. John C. Holland Enterprises, B-216250, Sept. 24, 1984, 84-2 C.P.D. ¶ 336; J.R. Youngdale Construction Co., and John R. Selby, Inc., B-214448, B-214484, Mar. 13, 1984, 84-1 C.P.D. ¶ 306. There is no legal duty for the contracting officer to telephonically check with the SBA as to the status of a size determination, nor does the fact that he had previously checked such status with the SBA estop him from making award if he complied with the FAR.

Clawson Travel also asserts that GSA should have known the Morris' small business self-certification was erroneous and that the protest to SBA would be upheld, and should therefore not made an award. However, by Clawson Travel's own admission, this protest was "not a typical appeal in that it challenged one of the fundamental size formulas used by the SBA." Since Clawson Travel has not established that Morris' small business self-certification was not made in good faith, its protest is denied.

Nevertheless, Morris has been found by SBA to be other than an small business concern on this small business set-aside procurement. In view of Morris' status, we recommend that the options in its contract not be exercised.



Acting Comptroller General
of the United States